Flowbird Malaysia Sdn Bhd v Alain Taher Osterlind & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCvC-197–04 OF 2020
RAJA AHMAD MOHZANUDDIN SHAH JC
1 APRIL 2024

Tort — Breach of confidence — Disclosure of confidential information — Conspiracy to injure — Plaintiff claimed confidential information used by defendants — Whether information disclosed by first and/or second defendants to third defendant was confidential information belonging to plaintiff — Whether defendants conspired to injure plaintiff through use of any of plaintiff's confidential information to detriment of plaintiff — Whether first and second defendants acted in breach of confidence, in breach of employment contracts, directors' duties, common law duties and/or statutory duties and placed themselves in conflict of interest position vis a vis plaintiff — Whether there was damages from conspiracy and/or breaches

The plaintiff was engaged in the business of providing parking solutions. Both the first and second defendants were former employees of the plaintiff where the first defendant served as the plaintiff's managing director and the second defendant served as its chief technology officer. The third defendant was also engaged in the business of providing parking solutions and was incorporated in Switzerland. The first and second defendant travelled to Amsterdam in March 2018 to represent the plaintiff at an international event where they met the third defendant's officers. Sometime in April 2018, the third defendant received emails from the first and second defendants containing information that belonged to the plaintiff and was available to the first and second defendants through their employment and directorships with the plaintiff. Following that, all defendants met in Geneva, Switzerland from 2 May 2018 to 5 May 2018. On 21 February 2019, the first and second defendants incorporated SPS IEM Malaysia Sdn Bhd ('SPS IEM'). The third defendant, meanwhile, had a subsidiary in Singapore, IEM Smart Parking Solutions Pte Ltd which was incorporated on 21 June 2018. The plaintiff's services were previously employed by a New Zealand company called Harding Traffic Ltd ('Harding') but were terminated, and Harding utilised the equipment of the third defendant. Further, SPS IEM participated in bids in Kuala Terengganu while the third defendant participated in bids in Rotorua, New Zealand and Makassar, Indonesia. The issues for consideration were: (a) whether the information disclosed by the first and/or second defendants to the third defendant was confidential information belonging to the plaintiff; (b) whether the defendants conspired to injure the plaintiff through the use of any of the plaintiff's confidential information to the detriment of the plaintiff; (c)

whether the first and second defendants acted in breach of confidence, in breach of their employment contracts, directors' duties, common law duties and/or statutory duties and placed themselves in a conflict of interest position vis a vis the plaintiff; and (d) whether there was damages from the conspiracy and/or breaches.

Held, allowing the claim:

(1) The emails and supporting documents contained confidential information that was later communicated to the third defendant without the plaintiff's permission. The second and third defendants' claim that the materials involved publicly available information and would be available online did not hold water. There were no sufficient materials to demonstrate that the publicly available documents and information were accessible online. The third defendant was, without a doubt, the recipient of the plaintiff's confidential information with notice that it was confidential when it obtained that information and materials from the first and second defendants, and not merely from other publicly available sources as claimed by them. Thus, the third defendant was no longer considered a bona fide party who was unaware of the nature of the confidential information that they received (see paras 28, 31–32 & 35).

(2) There were no coincidence circumstances that as soon as the surrounding events took place, there were certain activities taking place which would not have occurred without the occurrence of the meeting in Amsterdam, which led to the issuance of those emails followed by the Geneva meeting. Ultimately, the plaintiff suffered losses as a result of these incidents (see paras 38 & 43).

(3) The plaintiff's pleadings had sufficiently established the elements of breach of confidence and unlawful conspiracy where a careful reading of the statement of claim would reveal that the entire act complained of was not lawful. As to the non-incorporation of the SPS IEM as a party herein as argued by the third defendant, it was sufficient to simply include the three defendants who were the central characters in the conspiracy story. According to the first and second defendants' employment contracts, the information passed on to the third defendant was clearly private and confidential information that could only be obtained by them in their capacities as the plaintiffs' employees and directors, and certainly not the third defendant, who was not only an outsider but also a competitor of the plaintiff. The first and second defendants had no business sharing all those details with the third defendant. The first and second defendants had not only committed breach of confidence, but also breached their employment contracts. The elements of a conspiracy to harm the plaintiff existed involving all defendants. The first and second defendants had clearly breached their fiduciary duties. The second defendant

resignation from the plaintiff's company was on 31 August 2018, and not 9 January 2018 as both the plaintiff and the second defendant agreed to this fact in the agreed facts prepared by both parties and the resignation letter dated 9 January 2018 did not take effect immediately, but would only take effect once all shares of Cale Holding AB, a Swiss company, had been transferred. The second defendant's position was unfounded and accordingly, the findings regarding the third defendant was equally applicable to the second defendant (see paras 46, 48, 51–53 & 55).

(4) In terms of the injunction claim, there was no evidence that the same information obtained from the plaintiff had been applied in some other countries or projects. Therefore, the findings made applied only to the Rotorua and Makassar projects. On the issue of the calculation of damages amounting to USD253,321.30 as a result of the termination by Harding, PW1 had adequately addressed this issue in the sense that the amount had been calculated and accordingly, this was the amount of loss suffered by the plaintiff as a result of the termination of orders (see paras 57–58).

[Bahasa Malaysia summary

Plaintif terlibat dalam perniagaan penyediaan penyelesaian tempat letak kereta. Kedua-dua defendan pertama dan kedua adalah bekas pekerja plaintif di mana defendan pertama berkhidmat sebagai pengarah urusan plaintif dan defendan kedua berkhidmat sebagai ketua pegawai teknologi. Defendan ketiga juga terlibat dalam perniagaan penyediaan penyelesaian tempat letak kereta dan diperbadankan di Switzerland. Defendan pertama dan kedua telah pergi ke Amsterdam pada Mac 2018 untuk mewakili plaintif di satu acara antarabangsa di mana mereka bertemu dengan pegawai-pegawai defendan ketiga. Pada April 2018, defendan ketiga menerima emel daripada defendan pertama dan kedua yang mengandungi maklumat milik plaintif dan boleh diakses oleh defendan pertama dan kedua melalui pekerjaan dan jawatan mereka dengan plaintif. Selepas itu, semua defendan bertemu di Geneva, Switzerland dari 2 Mei 2018 hingga 5 Mei 2018. Pada 21 Februari 2019, defendan pertama dan kedua menubuhkan SPS IEM Malaysia Sdn Bhd ('SPS IEM'). Sementara itu, defendan ketiga mempunyai anak syarikat di Singapura, IEM Smart Parking Solutions Pte Ltd yang diperbadankan pada 21 Jun 2018. Perkhidmatan plaintif sebelum ini digunakan oleh sebuah syarikat New Zealand bernama Harding Traffic Ltd ('Harding') tetapi telah ditamatkan, dan Harding menggunakan peralatan defendan ketiga. Selain itu, SPS IEM menyertai bidaan di Kuala Terengganu manakala defendan ketiga menyertai bidaan di Rotorua, New Zealand dan Makassar, Indonesia. Isu-isu untuk dipertimbangkan adalah: (a) sama ada maklumat yang didedahkan oleh defendan pertama dan/atau kedua kepada defendan ketiga merupakan maklumat sulit milik plaintif; (b) sama ada defendan berkonspirasi untuk mencederakan plaintif melalui penggunaan mana-mana maklumat sulit

plaintif sehingga merugikan plaintif; (c) sama ada defendan pertama dan kedua bertindak dengan melanggar kewajipan kerahsiaan, melanggar kontrak pekerjaan mereka, kewajipan pengarah, kewajipan di bawah undang-undang am dan/atau kewajipan statutori dan meletakkan diri mereka dalam keadaan konflik kepentingan berbanding dengan plaintif; dan (d) sama ada terdapat kerugian daripada konspirasi dan/atau pelanggaran tersebut.

Diputuskan, membenarkan tuntutan:

(1) Emel dan dokumen sokongan mengandungi maklumat sulit yang telah dikomunikasikan kepada defendan ketiga tanpa kebenaran plaintif. Dakwaan defendan kedua dan ketiga bahawa material tersebut melibatkan maklumat yang boleh diakses umum dan boleh didapati dalam talian adalah tidak berasas. Tiada material yang mencukupi untuk menunjukkan bahawa dokumen dan maklumat yang boleh diakses umum tersebut boleh diakses secara dalam talian. Defendan ketiga, tanpa ragu-ragu, merupakan penerima maklumat sulit plaintif dengan notis bahawa ia adalah sulit apabila ia memperoleh maklumat dan material tersebut daripada defendan pertama dan kedua, dan bukan semata-mata daripada sumber lain yang tersedia untuk umum seperti yang didakwa. Oleh itu, defendan ketiga tidak lagi dianggap sebagai pihak bona fide yang tidak mengetahui sifat maklumat sulit yang mereka terima (lihat perenggan 28, 31–32 & 35).

(2) Tiada keadaan kebetulan sejurus selepas peristiwa sekitar berlaku, terdapat aktiviti tertentu yang berlaku yang tidak akan berlaku tanpa terjadinya pertemuan di Amsterdam, yang membawa kepada penghantaran e-mel tersebut diikuti dengan pertemuan di Geneva. Akhirnya, plaintif mengalami kerugian akibat kejadian-kejadian ini (lihat perenggan 38 & 43).

(3) Pengakuan plaintif telah cukup untuk membuktikan unsur pelanggaran kerahsiaan dan konspirasi yang menyalahi undang-undang di mana pembacaan teliti terhadap pernyataan tuntutan akan mendedahkan bahawa keseluruhan tindakan yang diadukan adalah tidak sah. Mengenai ketiadaan kemasukan SPS IEM sebagai pihak di sini seperti yang dihujahkan oleh defendan ketiga, adalah mencukupi untuk hanya menyertakan ketiga-tiga defendan yang merupakan watak utama dalam cerita konspirasi tersebut. Menurut kontrak pekerjaan defendan pertama dan kedua, maklumat yang disampaikan kepada defendan ketiga jelas merupakan maklumat persendirian dan sulit yang hanya boleh diperoleh oleh mereka dalam kapasiti mereka sebagai pekerja dan pengarah plaintif, dan sudah tentu bukan defendan ketiga yang bukan sahaja orang luar tetapi juga pesaing plaintif. Defendan pertama dan kedua tidak mempunyai urusan untuk berkongsi semua maklumat tersebut dengan defendan ketiga. Defendan pertama dan kedua bukan sahaja telah

melakukan pelanggaran kerahsiaan, malah melanggar kontrak pekerjaan mereka. Elemen konspirasi untuk mencederakan plaintif telah wujud melibatkan semua defendan. Defendan pertama dan kedua jelas telah melanggar kewajipan fidusiari mereka. Perletakan jawatan defendan kedua dari syarikat plaintif adalah pada 31 Ogos 2018, dan bukan 9 Januari 2018 seperti yang dipersetujui oleh kedua-dua pihak plaintif dan defendan kedua dalam fakta dipersetujui yang disediakan oleh kedua-dua pihak dan surat perletakan jawatan yang bertarikh 9 Januari 2018 tidak berkuat kuasa serta-merta, tetapi hanya akan berkuat kuasa setelah semua saham Cale Holding AB, satu syarikat Switzerland, telah dipindahkan. Kedudukan defendan kedua tidak berasas dan oleh itu, penemuan berkaitan defendan ketiga adalah sama terpakai kepada defendan kedua (lihat perenggan 46, 48, 51–53 & 55).

(4) Dari segi tuntutan injunksi, tidak ada keterangan bahawa maklumat yang sama diperoleh daripada plaintif telah digunakan di beberapa negara atau projek lain. Oleh itu, penemuan yang dibuat hanya terpakai kepada projek Rotorua dan Makassar. Mengenai isu pengiraan ganti rugi berjumlah USD253,321.30 akibat penamatan oleh Harding, PW1 telah menangani isu ini dengan secukupnya dalam erti kata bahawa jumlah tersebut telah dikira dan sewajarnya, ini adalah jumlah kerugian yang dialami oleh plaintif akibat penamatan arahan tersebut (lihat perenggan 57–58).]

Cases referred to

Coco v AN Clark (Engineers) Ltd [1969] RPC 41, HC (refd)
Saltman Engineering Co Ltd and Others v Campbell Engineering Co Ltd [1963] 3 All ER 413, CA (folld)
Seager v Copydex Ltd [1967] 2 All ER 415, CA (refd)
Valeo Vision Société Anonyme and another v Flexible Lamps Ltd [1995] RPC 205 (refd)
Worldwide Rota Dies Sdn Bhd v Ronald Ong Cheow Joon [2010] 8 MLJ 297, HC (folld)
Zaharen bin Hj Zakaria v Redmax Sdn Bhd and other appeals [2016] 5 MLJ 91, CA (folld)

Legislation referred to

Companies Act 2016 s 213

K Shanti Mogan (with Denise Choo) (Shearn Delamore & Co) for the plaintiff.
Nur Afiqah bt Mohd Ashriee (with Muhamad Izham bin Pandak Muhamad) (Saiful, Roger & Co) for the second defendant.
Lee Shih (with Lee Suan Cui) (Lim Chee Wee Partnership) for the third defendant.

Raja Ahmad Mohzanuddin Shah JC:

PRELIMINARY

[1] In this case, there is a dispute that arises as a result of a competition between companies that aim to provide the best possible parking solutions and equipment, not only to the municipalities of the local governments or parking operators, but most importantly to the consumers, the owners of vehicles.

AN OVERVIEW OF THE FACTS OF THE CASE

[2] The plaintiff is a Malaysian company that was formerly known as Cale Malaysia Sdn Bhd. As a result of a merger between Parkeon SAS and Cale Group AB, Cale Malaysia Sdn Bhd became Flowbird Malaysia Sdn Bhd, the plaintiff.

[3] The plaintiff is engaged in the business of providing parking solutions.

[4] Both the first and second defendants were former employees and directors of the plaintiff. The first defendant served as the plaintiff's Managing Director and the second defendant served as its Chief Technology Officer. On 1 July 2018 and 31 August 2018, the first and second defendants resigned from their respective provisions.

[5] The third defendant is also engaged in the business of providing parking solutions and is incorporated in Switzerland.

[6] Sometime in April 2018, the third defendant received emails from the first and second defendants. These emails contained information that belonged to the plaintiff and was available to the first and second defendants through their employment and directorships with the plaintiff. These documents included the plaintiffs business strategies, business models, proposals, budgets, pricing and offers to clients.

[7] Following that, all defendants met in Geneva Switzerland from 2 May 2018 to 5 May 2018.

[8] On 21 February 2019, the first and second defendants incorporated SPS IEM Malaysia Sdn Bhd ('SPS IEM'). SPS IEM has now been dissolved.

[9] The third defendant, meanwhile, has a subsidiary in Singapore, IEM Smart Parking Solutions Pte Ltd ('IEM Singapore'), which was incorporated on 21 June 2018.

[10] In one instance of business rivalry, it appears that the plaintiffs services were previously employed by a New Zealand company called Harding Traffic Ltd but were terminated, and Harding Traffic Ltd utilises the equipment of the third defendant.

[11] Further, SPS IEM participated in bids in Kuala Terengganu while the third defendant participated in bids in Rotorua, New Zealand and Makassar, Indonesia.

ISSUES TO BE TRIED

[12] There are two sets of issues that have been raised by the parties for my determination in the dispute between them. The first is the plaintiffs list of issues to be tried with the first and second defendants and the second is the list of agreed issues to be tried between the plaintiff and the third defendant. In light of these two enclosures, I have sufficient understanding of where the parties are coming from so as to appreciate their positions and contentions.

[13] In order to accomplish this, I will first discuss the issues involving the plaintiff and the third defendant, followed by the plaintiff and the second defendant. With respect to the first defendant, he did not enter an appearance, leading to the filing of a certificate of nonappearance against him.

[14] Given the nature and effect of the plaintiffs causes of action against all the defendants, some of the issues dealt with between the plaintiff and the third defendant will automatically bind the second defendant, whereas any specific issues raised by the second defendant will be dealt with separately.

[15] For the purposes of this decision, I will only address a few of the main issues that I believe will sufficiently tie up and connect the parties' legal relationship with each other as well as the issue of liabilities if they are found to have arisen. The following are the key issues:

(a) whether the information disclosed by the first and/or second defendants to the third defendant is confidential information belonging to the plaintiff?

(b) whether the defendants conspired to injure the plaintiff through the use of any of the plaintiffs confidential information to the detriment of the plaintiff?

(c) whether the first and second defendants acted in breach of confidence, in breach of their employment contracts, directors' duties, common law duties and/or statutory duties and place themselves in a conflict of interest position vis a vis the plaintiff? and

(d) what damages, if any, which arise from the conspiracy and/or such breaches?

[16] In the following analysis and findings, those issues will be addressed simultaneously.

COURT'S ANALYSIS AND FINDINGS

[17] The first issue I must address before I can even consider the other issues is whether the information disclosed by the first and/or second defendants to the third defendant is confidential information belonging to the plaintiff. If this issue is answered in the affirmative, the other issues may need to be examined further but if it is answered in the negative, the plaintiffs case is over.

[18] My first step in this process is to be convinced, on a balance of probabilities, that confidential information exists in the circumstances of the case. Secondly, I must be satisfied that the information was communicated to another unconnected third party and, thirdly, that the information was used unauthorisedly to harm the owner.

[19] As a means of providing self-guidance, what constitutes confidential information? In *Worldwide Rota Dies Sdn Bhd v Ronald Ong Cheow Joon* [2010] 8 MLJ 297, His Lordship Abdul Malik Ishak J (as His Lordship then was) explained that confidential information would also include information concerning customers, cost prices, as well as customers' specific needs and requirements. According to His Lordship at p 332:

> [83] All these authorities serve as good guidelines in adjudicating this case. It must be borne in mind that confidential information would also cover information relating to customers, cost prices together with the specific needs and requirements of customers. In the present case, the defendant had access to all these and he did not deny them. The irresistible inference can be drawn that the defendant was guilty of revealing and utilising the confidential secrets of the plaintiff when the defendant joined Alpha. What the defendant did would certainly amount to breaching cll 8 and 9 of the letter of offer in exh P1.

[20] There is also some useful guidance in the judgment of Lord Greene MR in *Saltman Engineering Co Ltd and Others v Campbell Engineering Co Ltd* [1963] 3 All ER 413 at p 415:

> The information, to be confidential, must, I apprehend, apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge. On the other hand, it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker on materials which may be available for the use of anybody; but what makes it confidential is the

fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process.

[21] Having identified the above, what are the elements of a claim based on a breach of confidence or disclosure of confidential information? Megarry J stated the following at pp 47–48 in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41:

> In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, MR in the *Saltman* case on p 215, must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it. I must briefly examine each of these requirements in turn.
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> First, the information must be of a confidential nature. As Lord Greene said in the *Saltman* case at p 215, 'something which is public property and public knowledge' cannot per se provide any foundation for proceedings for breach of confidence. However confidential the circumstances of communication, there can be no breach of confidence in revealing to others something which is already common knowledge. But this must not be taken too far. Something that has been constructed solely from materials in the public domain may possess the necessary quality of confidentiality: for something new and confidential may have been brought into being by the application of the skill and ingenuity of the human brain. Novelty depends on the thing itself, and not upon the quality of its constituent parts. Indeed, often the more striking the novelty, the more commonplace its components. Mr Mowbray demurs to the concept that some degree of originality is requisite. But whether it is described as originality or novelty or ingenuity or otherwise, I think there must be some product of the human brain which suffices to confer a confidential nature upon the information: and, expressed in those terms, I think that Mr Mowbray accepts the concept.
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> The difficulty comes, as Lord Denning, MR pointed out in the *Seager* case on p 931, when the information used is partly public and partly private; for then the recipient must somehow segregate the two and, although free to use the former, must take no advantage of the communication of the latter. To this subject I must in due course return. I must also return to a further point, namely, that where confidential information is communicated in circumstances of confidence the obligation thus created endures, perhaps in a modified form, even after all the information has been published or is ascertainable by the public; for the recipient must not use the communication as a spring-board (see the *Seager* case, pp 931 and 933). I should add that, as shown by *Cranlegigh Precision Engineering Ltd v Bryant* [1965] 1 WLR 1293; [1966] RPC 81, the mere simplicity of an idea does not prevent it being confidential (see pp 1309–1310). Indeed, the simpler an idea, the more likely it is to need protection.
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> The second requirement is that the information must have been communicated in circumstances importing an obligation of confidence. However secret and confidential the information, there can be no binding obligation of confidence if

that information is blurted out in public or is communicated in other circumstances which negative any duty of holding it confidential. From the authorities cited to me, I have not been able to derive any very precise idea of what test is to be applied in determining whether the circumstances import an obligation of confidence. In the *Argyll* case at p 330, Ungoed-Thomas J concluded his discussion of the circumstances in which the publication of marital communications should be restrained as being confidential by saying, 'If this was a well-developed jurisdiction doubtless there would be guides and tests to aid in exercising it'. In the absence of such guides or tests the then in effect concluded that part of the communications there in question would on any reasonable test emerge as confidential. It may be that that hard-worked creature, the reasonable man, may be pressed into service once more; for I do not see why he should not labour in equity as well as at law. It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence. In particular, where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint venture or the manufacture of articles by one party for the other, I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence: see the *Saltman* case at p 216. On that footing, for reasons that will appear, I do not think I need explore this head further. I merely add that I doubt whether equity would intervene unless the circumstances are of sufficient gravity; equity ought no to be invoked merely to protect trivial tittle-tattle, however confidential.

Thirdly, there must be an unauthorised use of the information to the detriment of the person communicating it. Some of the statements of principle in the cases omit any mention of detriment; other include it. At first sight, it seems that detriment ought to be present if equity is to be induced to intervene; but I can conceive of cases where a plaintiff might have substantial motives for seeking the aid of equity and yet suffer nothing which could fairly be called detriment to him, as when the confidential information shows him in a favourable light but gravely injures some relation or friend of his whom he wishes to protect. The point does not arise for decision in this case, for detriment to the plaintiff plainly exists. I need therefore say no more than that although for the purposes of this case I have stated the propositions in the stricter form, I wish to keep open the possibility of the true proposition being that in the wider form.

[22] A summary of the elements identified by Megarry J can be found below:

(a) that the information was of a confidential nature;

(b) that it was communicated in circumstances importing an obligation of confidence; and

(c) that there was an unauthorised use of the information to the detriment of the owner of such information.

[23] In light of this, in relation to the effect of parties using confidential information is concerned, it appears that case law seems to suggest that when a defendant uses confidential information without consent, whether obtained directly or indirectly from the plaintiff, the defendant is guilty of infringing the plaintiffs rights. Upon examining this issue, in the English Court of Appeal case of *Seager v Copydex Ltd* [1967] 2 All ER 415, Lord Denning MR, in affirming *Saltman Engineering Co Ltd* observed the following at p 417:

> The Law.
>
> I start with one sentence in the judgment of Lord Greene MR in *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* [1963] 3 All ER 413 at p 414, letters h, i; 65 RPC at p 213(1):
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> > If a defendant is proved to have used confidential information, directly or indirectly obtained from the plaintiff, without the consent, express or implied, of the plaintiff, he will be guilty of an infringement of the plaintiffs rights.
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> To this I add a sentence from the judgment of Roxburgh J in *Terrapin v Builders' Supply Co (Hayes) Taylor Woodrow & Swiftplan Ltd* [1960] RPC 128 at p 130), which was quoted and adopted as correct by Roskill J in *Cranleigh Precision Engineering Co Ltd v Bryant* [1956] 3 All ER 289 at pp 301–302, letter e):
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> > As I understand it, the essence of this branch of the law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication, and springboard it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public.
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> The law on this subject does not depend on any implied contract. It depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it. He must not make use of it to the prejudice of him who gave it without obtaining his consent ...

[24] Taking a closer look at the facts at hand, in determining whether confidential information exists, I need to examine the evidence presented by the parties. With regard to this, it all began when the first defendant and the second defendant ('DW1') travelled to Amsterdam in March 2018 to represent the plaintiff at an international event called Intertraffic. I would like to highlight at this point that the event involved not only networking sessions and exhibitions on the newest trends and developments in smart mobility, parking and traffic management from the perspective of the traffic technology industry but also a networking event where traffic technology professionals from all over the world could share ideas and make connections.

[25] It is rather cliche to say that one thing always leads to another. In this sense, one business networking session led to another. This is what happened in this case. The first and second defendants met with Philippe Menoud ('DW2'),

the third defendant's Chief Executive Officer and board member, along with Francois Menoud, the third defendant's Chief Technology Officer.

[26] Following such a meeting, barely a month after the first and second defendants encountered the gentlemen from the third defendant, the first defendant began sending emails to DW2 with carbon copies to the second defendant and Francois Menoud, totaling eight emails. Some of the information contained in these emails related to the plaintiff's business operations, the group's strategy, projects, market analysis, pricing, payment terms, discounts and machine specifications related to the plaintiff's clients, its performance in Asia and the expansion plan.

[27] This can be evident from the following emails, which have been sufficiently and clearly identified by the plaintiff's learned counsel that deserves to be reproduced here:

(a) the first defendant sent an email to DW2 on 13 April 2018, in which the second defendant and Francois were copied. The email attached a letter from the Chief Executive Officer of the plaintiff's group and presentation slides which discuss the plaintiff's group's strategy, projects, market analysis and goals. These slides were presented during the plaintiff's management conference;

(b) the first defendant emailed DW2 on 15 April 2018 with copies to the second defendant and Francois. The first defendant thanks DW2 for providing the third defendant's confidential information. He proposes Martin Frid, the plaintiff's employee, for consideration for employment by the third defendant, and provides flight details for himself, the second defendant and Rizal Zainuddin to Geneve. DW2 acknowledges this and expresses delight at meeting them, including requesting that they stay closer to the third defendant's offices in order to be 'more productive';

(c) on 17 April 2018, the first defendant sent the first email to DW2, with a copy sent to the second defendant and Francois. This document provides the third defendant with information regarding the recurring revenue generated by the plaintiff and the market available in Malaysia. It also outlines the plaintiff's offers to its customer ('Vista Summerose Sdn Bhd'), which include machine specifications, pricing and payment terms for Seremban and Jasin. Additionally, it includes a copy of Vista Summerose's order confirmations;

(d) in the second email of 17 April 2018, the first defendant responds to DW2's questions regarding the first email. DW2 requested confirmation and answers concerning, amongst others, whether the machine provided to the plaintiff's customer ('Vista Summerose') had been installed and whether the card reader was a Touch n Go reader

rather than a credit card reader. The first defendant responded to all questions posed. The first defendant confirmed the machines used for Vista Summerose as well as the use of card readers for Touch n Go. In addition, the first defendant provided information regarding the use of credit cards in Malaysia and the plaintiffs previous developments for integration, including the plaintiffs plans to use its own card reader;

(e) on 17 April 2018, the first defendant sent a third email to DW2 and Francois, with a copy to the second defendant. This email is entitled 'Business Model Asia' and attaches the business model/proposal the plaintiff uses in the region to assist new operators and distributors. Additionally, it provides information regarding the market in Bangkok and the plaintiffs sales there;

(f) email on 18 April 2018 — the first defendant sent an email to DW2 and Francois, with a copy to the second defendant. It contains information regarding the rate of discount offered by the plaintiff as well as information regarding the payment of the first order placed by the Kuala Lumpur City Hall in full. There is an attachment to the email containing the plaintiffs delivery orders and/or invoices with its clients across Malaysia, Indonesia, Singapore, Australia and New Zealand, as well as an extract of its agreement with Harding Traffic Ltd ('Harding'). The contact person for Indonesia is Rizal Zainuddin ('Rizal'). Rizal is the contact person for Vertikal Akses Asia, the plaintiffs client;

(g) the first defendant sent DW2 an email on 27 April 2018. In this email, DW2 is thanked for a 'great conference call' and promised to keep EBITA high. The first defendant is not worried because of the current condition of the market and the third defendant's commitment to supporting its team in APAC. In addition, the first defendant discusses with DW2 his salary preferences and the bonus received from the plaintiff. Furthermore, the email outlines the first defendant's strategy for establishing a local entity in the APAC region and suggests establishing a subsidiary in Kuala Lumpur and a virtual representative office in Singapore. DW2 is assured by the first defendant that he pays income tax in Singapore, so there will be no problems with this. The email also attaches the first defendant's bonus criteria, the plaintiffs offer to Kuala Lumpur City Hall, the plaintiff's agreement with Vista Summerose, the approval issued by the National Measurement Standards laboratory for the use of the plaintiff's machines, the special approval issued by SIRIM QAS International Sdn Bhd, and the plaintiffs directors' circular resolution for a tenancy for its offices, as well as a form of fire insurance proposal; and

(h) on 29 April 2018, the first defendant emailed DW2 and Francois, with Rafiz as a copy. This email provides the plaintiff's budget and how it was achieved (eg by sales in Malaysia, Tripoli, Rotorua, Indonesia and

Melbourne) as well as a spreadsheet describing the plaintiffs performance in the Asia Pacific region (ie various cities in Malaysia, Indonesia, Sri Lanka, New Zealand, Australia and Myanmar).

[28] After reviewing those emails and the supporting documents, it is my opinion that based on their nature and characters and in light of the above case law, which supports the assertion that similar information contained in the emails is confidential in nature and effect, they undoubtedly contain confidential information that was later communicated to the third defendant without the plaintiffs permission.

[29] As further proof of this issue, DW2 acknowledged this fact when he thanked the first defendant for providing 'confidential information' in his reply email. In addition, it is worth noting that there is no real dispute between the second and third defendants who only advanced bare assertions that the confidential information could be found online.

[30] Moreover, the second defendant also admitted under cross-examination that some of the documents obtained were confidential and could not be accessed online. Further, he acknowledged that the emails sent on 17 April 2018 and 18 April 2018 contained confidential information that should not be disclosed to the third defendant since they contained details that would allow the third defendant to determine the amount of sales made by the plaintiff, the prices offered, the machine specifications required and other terms of business and marketing offered by the plaintiff. It was also admitted by the second defendant that he had an obligation to inform the plaintiff that confidential information was being passed on to a competitor, but he failed to do so. This was the most significant evidence from the second defendant. On top of that, the second defendant did nothing to oppose to dissemination of such information.

[31] With respect to the issue of publicly available documents, it seems to me that the second and third defendants' claim that those materials involve publicly available information and would be available online does not hold water in light of the glaring evidence available in this dispute. While the plaintiffs business nature and the projects in which it participated could have been made public, some of the information provided through those emails could not be obtained through that means. Both the second defendant and DW2 have also sufficiently agreed with this proposition.

[32] Additionally, I find that there are no sufficient materials before me to demonstrate that such publicly available documents and information are accessible online. It appears to me that the second defendant and DW2 seem to

agree on this. As a result, they have failed to establish that the documents could be obtained through the public domain.

[33] My attention is further drawn to another important factor involving the third defendant's position. It appears that the third defendant, through the testimony of DW2, was aware of the fact that the emails sent by the first and/or second defendants were not authorised by the plaintiff. In this regard, DW2's admission that he would not have allowed the third defendant's employees to share the same information with others and his admission in his witness statement that the third defendant had considered the first and second defendant's employment contracts after the meeting in May 2018 would add additional suspicious elements to his conduct. Taken together, the events and the defendants' conduct reveal a suspicious connection. As it was in this case, the third defendant would not condone the same thing if it involved its own property. In the same way, the plaintiff would not expect its property to be shared with strangers, much less a competitor, by its own internal parties.

[34] Additionally, I conclude that it is an agreed upon fact between the plaintiff and the second defendant that the third defendant obtained those emails after they had been supplied to the third defendant by the first defendant, to the full knowledge and participation of the second defendant, while they were employees of the plaintiff and also its directors. As indicated above, there is clear evidence before me that confidential information was made available to the third defendant.

[35] In my analysis of the above factual circumstances and combining several instances to arrive at a solid justification, I conclude that the third defendant is, without a doubt, the recipient of the plaintiffs confidential information with notice that it was confidential when it obtained that information and materials from the first and second defendants, and not merely from other publicly available sources as claimed by them. Instead of disregarding the information and data, the third defendant clearly took advantage of it and gained benefits that it would not have been able to obtain without the first and second defendants' involvement. Thus, the third defendant is no longer considered a bona fide party who was unaware of the nature of the confidential information that they received. In this instance, I would not have found in favour of the plaintiff if there hadn't been the combination of evidence highlighted above; however, unfortunately, this is not the case for all defendants who appear to have worked together to achieve this common goal.

[36] To this end, in order to tie up the first and second defendants' conduct with the third defendant's actions, it is obvious that the law recognises that the

right to have the protection of confidentiality is an equitable right, and any infringement thereof can be asserted against a third party, except when the third party is a bona fide party without notice, which is not the case here (see *Valeo Vision Société Anonyme and another v Flexible Lamps Ltd* [1995] RPC 205).

[37] As to whether these acts by the defendants have detrimental effects on the plaintiff, there cannot be a doubt that a party who has obtained confidential information must not use that information as a springboard for activities detrimental to the other party who provided the confidential communication (see *Seager v Copydex Ltd* [1967] 2 All ER 415).

[38] As such, when it comes to these acts being detrimental to the plaintiff, I find that there are no coincidence circumstances that as soon as the above surrounding events took place, there were certain activities taking place which would not have occurred without the occurrence of the meeting in Amsterdam, which led to the issuance of those emails followed by the Geneva meeting. Consequently, the third defendant's subsidiary was incorporated in Singapore, even though the third defendant had never been present in the Asia Pacific region before.

[39] Resulting from this domino effect, the plaintiff is subjected to far-reaching consequences. In the first instance, Harding Traffic Ltd terminated the plaintiffs distribution rights for the Rotorua Lakes Council project on 13 August 2018 despite having discussed it for months prior to that date, not to mention that Harding Traffic Ltd was able to secure the distributorship for the implementation of the Rotorua Lakes Council through the plaintiffs support and assistance. Upon further analysis, it appears that the documents that were disclosed to the third defendant were an extract from the contract executed by Harding Traffic Ltd and the plaintiff, a price quote provided to Harding Traffic Ltd and a spreadsheet detailing the plaintiffs performance in Rotorua. To make matters worse, Harding Traffic Ltd awarded this new contract to none other than the third defendant's company. This fact was confirmed by DW2 during cross-examination.

[40] Additionally, I am not able to accept the third defendant's argument that the termination of the plaintiffs equipment was due to Harding Traffic Ltd's lack of confidence in the plaintiffs services. Not only is the evidence hearsay but there is no witness who can testify as to the actual meaning of Harding Traffic Ltd's alleged position in court. Aside from that, it is important to note that all of the facts presented by the plaintiff appear to have negated the defences raised by the third defendant.

A **[41]** This isn't the end of it. In October 2018, the Makassar project was awarded to the third defendant despite preliminary work being carried out by the plaintiff. A further indication is that this occurred after the plaintiff's quotations for Indonesian projects had been shared by the first and second defendants with the third defendant. According to further facts, PT Kinarya
B Terbaik Indonesia signed a memorandum of understanding with the local authority in Makasar, Indonesia. PT Kinarya Terbaik Indonesia turned out to be the customer of the third defendant.

C **[42]** In regard to this Makassar project, I find that the newspaper articles that prove the first defendant was there further enhance the conspiracy theory. It has to do with the third defendant's roles, as I have already mentioned, and their lack of presence in Asia Pacific at that point of time. Further, the court acknowledges the fact that without the thorough assistance of the first and
D second defendant's and the plaintiff's contacts and goodwill and also the involvement of a person named Rizal, who served as the plaintiffs contact in Makassar and apparently involved in securing the bid for the Makassar project, the third defendant would not be able to secure this project. In this instance, there was no satisfactory rebuttal by the third defendant to the irresistible
E presumption that what the third defendant got from Makassar and Rotorua was the result of such a conspiracy.

[43] It is evident that the timing of all these events clearly indicates that the complaints, as raised by the plaintiff, were not coincidences. Ultimately, the
F plaintiffs suffered losses as a result of these incidents. This has also been supported by PWTs detailed testimony. On the basis of the same facts as described above, it has further supplemented the position taken by PW1 that the plaintiff's confidential information was used to secure the above relevant projects.

G

[44] The above activities, also by no coincidence, resulted in the incorporation of SPS IEM Malaysia Sdn Bhd, whose plans and suggestions were communicated between the defendants through one of the above emails. One cannot run from the fact that, without the plaintiff's material and
H information, there would have been no activities, as mentioned above, that clearly led to all those carefully designed plans. There is no doubt that IEM Malaysia Sdn Bhd is closely related to the third defendant.

[45] Another observation on the above main issue relates to the third
I defendant's allegations that the plaintiff has failed to adequately address the conspiracy issue in its pleadings as well as the inadequacy of the evidence provided. The third defendant claims that references to the statement of claim indicate that SPS IEM Malaysia Sdn Bhd was the vehicle used by the first and second defendants to promote, sell and distribute parking solutions.

Furthermore, the statement of claim also claims that the first and second defendants, along with the third defendant, had exploited the plaintiff's confidential information. However, according to the third defendant, this so-called vehicle has no business relationship with the third defendant. As the third defendant points out, based on the pleadings there is no link per se between SPS IEM Malaysia Sdn Bhd being part of the conspiracy or being used to obtain confidential information.

[46] Following a careful analysis of the main issues and the factual circumstances alluded to therein, as well as reviewing the plaintiff's statement of claim and reply, I conclude that the plaintiff's pleadings have sufficiently established the elements of breach of confidence and breach of conspiracy, amongst others. It appears that there was no deficiency in the pleadings that led to the unwarranted situation of barring the plaintiff from the facts described above, which constitutes my substantial findings. The issue of unlawful conspiracy has also been sufficiently identified. A careful reading of the statement of claim would reveal that the entire act complained of is not lawful.

[47] To this end, further analysis revealed that the plaintiff has detailed the allegations of conspiracy quite extensively. Even if the third defendant argues that there are only two brief paragraphs about conspiracy in the statement of claim, reading the statement as a whole will reveal the facts that the plaintiff discovered the disclosure of confidential information to the third defendant after the resignations of the first and second defendants, which occurred in April 2018 before both the first and second defendants left their employment with the plaintiff. Consequently, the facts evolved as described above, where it is apparent from the pleadings that all necessary facts have been specified in detail.

[48] As to the non-incorporation of the SPS IEM as a party herein as argued by the third defendant, I believe it is sufficient to simply include the three defendants who are the central characters in the conspiracy story. When compared with the entire statement of claim, the elements necessary to establish conspiracy are sufficiently established. The testimony of DW2 and the position taken by the third defendant, as discussed above, further support this conclusion.

[49] As for the different entities involved being SPS IEM Malaysia and Singapore as also raised by the third defendant, there is no disputing that the third defendant was the party who obtained confidential information from the plaintiff via the first and second defendants. There can be no escaping the fact that the third defendant is benefiting from all this, while the plaintiff is losing out as a result of it. Based on the above facts, it is always possible to tie up all the entities in Singapore and Malaysia to the third defendant. Furthermore, even at

A that stage of the trial, there were so many references to these entities without any substantial challenge. Referring to the third defendant's position, it becomes clear that the challenge it made was that the projects were secured on their own efforts.

B **[50]** Furthermore, and as a matter of fact, when it comes to the position of the first and second defendants, even the employment contracts for them defines this as confidential information. According to the employment contracts, the following clause applies:

C > 'Confidential Information' means any information (whether in written, oral or any other form, and whether marked CONFIDENTIAL or not) as to the practice, business dealings or affairs of the Company, its Associated or Related Company and/or any of the Company's customers or clients or any of the Associated or Related Company's customers or clients or as to any other matters which may have come to the Employee's knowledge by reason of his employment. Confidential Information shall further include, (a) patent and patent applications, copyrighted works, trade secrets and any other intellectual property right; and (b) information relating to the method, methodology and/or processes of the business(es) of the Company, Associated or Related Companies; and (c) proprietary information, concepts, ideas, techniques, sketches, drawings, works of authorship, inventions, know-how, processes, tools, equipment, algorithms, software programs and formulae; and (d) proposed products and services of the Company or Associated or Related Company, and including, without limitation, the Company's (or its Associated or Related Company's) information concerning research, work, development, projects, design details and specifications, business forecasts, sales and marketing plans, customer or client lists, investors, employees, business and contractual relationships and information the Company (or its Associated or Related Company) provides regarding third parties.

G **[51]** According to the above clause, there was no doubt that the information passed on to the third defendant by the first and second defendants was clearly private and confidential information that could only be obtained by the first and second defendants in their capacities as the plaintiffs employees and directors, and certainly not the third defendant, who is not only an outsider but also a competitor of the plaintiff.

[52] Apart from that, I find that the first and second defendants had no business sharing all those details with the third defendant. In my opinion, no reasonable thinking employees who are not only still employed with their company and subject to the terms and conditions of employment but further subject to certain restrictions on communication with other third parties that survive their termination have the right to disseminate data and information belonging to their former employer.

[53] As a result of all these findings, I find that the first and second defendants had not only committed breach of confidence, but also breached their employment contracts. As a result of the above, I further find that the elements of a conspiracy to harm the plaintiff exist involving all defendants. Also, given that these findings exist, the first and second defendants have clearly breached their fiduciary duties.

[54] Regarding the position of the second defendant, he argues that the plaintiff alleges that he stopped acting as a director and employee of the plaintiff on 31 August 2018. In contrast, the position taken by the second defendant was that he no longer served as a director after 9 January 2018, which was indicated in his resignation letter. In other words, this clearly indicates that the second defendant no longer served as director after 9 January 2018. Therefore, when the first defendant sent the eight emails to the third defendant, which had been carbon copied to the second defendant, he was no longer a director at the time. Additionally, the second defendant asserts that he should report all his duties to the first defendant. As a result, s 213 of the Companies Act 2016 is not applicable to the second defendant as suggested by the plaintiff. Specifically, s 213 of the Companies Act 2016 identifies a director's statutory duties to exercise his powers in good faith in the interest of the company and for a proper purpose. In this regard, a director would be disqualified from holding directorships if such an offence has been committed.

[55] On this issue, I find that the second defendant resignation from the plaintiff's company was on 31 August 2018, and not 9 January 2018. Firstly, both the plaintiff and the second defendant agreed to this fact in the agreed facts prepared by both parties on 25 October 2021. Second, the resignation letter dated 9 January 2018 did not take effect immediately, but would only take effect once all shares of Cale Holding AB, a Swiss company, had been transferred. As a result of reviewing the above position, I find that the second defendant's position is unfounded. Accordingly, I consider the findings above regarding the third defendant to be equally applicable to the second defendant. Regardless, it appears that on top of that, the second defendant did not object to the dissemination of such information. This means that the second defendant should also be equally responsible. As an employee or as a director of the plaintiffs company, it is the second defendant's duty to act in the plaintiffs best interest at all times.

[56] These findings are best supported by the Court of Appeal decision in *Zaharen bin Hj Zakaria v Redmax Sdn Bhd and other appeals* [2016] 5 MLJ 91 on the issue of whether, in addition to owing fiduciary duties to the company as a director, the employee also owed a duty of fidelity to act in the best interests of the company and not to its detriment. On this issue, His Lordship Abang Iskandar JCA (now the President of the Court of Appeal) provided the

following analysis:

> [38] At the outset, it must be made clear that as a director of the plaintiff, the second defendant owed a fiduciary duty to the company and the shareholders. Decided cases abound had made the relationship between a director and his company as being trite. As an employee of the plaintiff, the second defendant also had the duty of fidelity towards the company. Basically, that would mean a duty to be loyal to the interest of the company and its shareholders. Both duties presuppose the need to ensure that a director and an employee must act and discharge their responsibilities in a manner that is in the best interest of the company and not act in a manner that may be detrimental to the interest of the company ...
>
> [45] In the context of this case, of course, ordinarily being a subordinate must necessarily mean that the second defendant would have to obey instructions emanating from the first defendant. But the law does not impose absolute duty to obey in all situations. Only lawful and reasonable directives or instructions must be obeyed by the subordinate. Definitely instructions given which are dubious and plainly unlawful, ought not to be obeyed to the tee, if at all. To do so would in fact make a subordinate an accomplice. The law does not impose such an onerous duty on an employee in the discharge of his obligations to his employer. As such, with such a duty of fidelity, blind loyalty and subservience to a superior's instructions cannot be condoned. Such a defence could not hold water, much less be sustained, definitely not in the circumstances obtaining in this appeal before us.
>
> [46] But, there was another factor which, to our mind, must weigh heavily against the second defendant. From the undisputed evidence led before the learned HCJ, as was alluded to earlier, the second defendant was also appointed as a director on the plaintiffs board of directors. With that appointment, he had assumed another duty qua the company. That duty is the fiduciary duty owed by all directors to their company. As alluded to earlier in our judgment, that duty obligates a director of a company to act in the best interest of the company. We do not believe that there should be a limited scope to be given to what would constitute a fiduciary duty. Suffice to state here that the baseline threshold must be to see whether the director's impugned conduct has the effect of bringing about adverse and detrimental effects against the interests and well-being of the company. It is akin to a duty thrust upon a trustee.

[57] I must now address the relief sought by the plaintiff. In terms of the plaintiffs relief, particularly the injunction claim, I agree with the third defendant in the sense that I have not seen any evidence that the same information obtained from the plaintiff has been applied in some other countries or projects. The findings made by me, therefore, applies only to the Rotorua Lakes Council and the Makassar Projects. It is very difficult for me to determine how and to what extent the third defendant has used the plaintiff's confidential information elsewhere except for the instances before me. Furthermore and apart from the findings involving Rotorua and Makassar's projects, I do acknowledge the third defendant also has some experience in

managing this type of business and technology, so it is difficult to assume and predict that they used all of the plaintiff's confidential information carte blanche in all of their projects.

[58] On the issue of the calculation of damages amounting to USD253,321.30 as a result of the termination by Harding Traffic Ltd, I consider PW1 to have adequately addressed this issue in the sense that USD253,321.30 has been calculated by multiplying the number of terminals by the unit price. Accordingly, this is the amount of loss suffered by the plaintiff as a result of the termination of orders made by Harding Traffic Ltd.

[59] In this regard, for the purpose of doing justice to all parties herein, I can only limit the use of confidential information based on my findings on the Rotorua Lakes Council and Makassar's projects. In that sense:

(a) I am not allowing the main injunction in para 43(a)(i) of the statement of claim on the ground that it is too wide and may pose difficulty to enforce. This is because the plaintiff is asking the defendants to cease doing any business similar to or in competition with the plaintiffs business that is based on its confidential information;

(b) however, para 43(a)(ii) of the statement of claim, which is the plaintiffs injunction for the defendants to cease the use of and return all confidential information belonging to the plaintiff in any form whatsoever eg documentation, computer disc, etc is allowed. This pertains only to information and materials that were provided in the eight emails in regard to the two projects previously mentioned;

(c) I am also allowing prayer (b) of the statement of claim for damages amounting to USD253,321.30 as a result of the termination by Harding Traffic Ltd;

(d) I allow prayer (c) of the statement of claim for the defendants to provide an account of the project in Makassar, Indonesia;

(e) I am also allowing prayer (d) for general damages but limited only to the Makassar's project;

(f) I am also allowing prayer (e) for a declaration that the first and second defendants have contravened their duties as directors, but I am not allowing any application by the registrar to disqualify the first and second defendants from acting or holding office as directors in Malaysian companies; and

(g) also, I am allowing interest on the judgment sum of USD253,321.30 and also on the amount of general damages at the rate of 5%pa from the date of judgment until full and final settlement.

A CONCLUSION

[60] The plaintiff's claim is therefore allowed as just pronounced with costs of RM30,000 to be paid by each of the second defendant and third defendant, subject to allocatur.

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Claim allowed.

Reported by Ahmad Ismail

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